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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JIMMIE DAVIS,

Petitioner,

v.

JOHN IGNACIO, et al.,

Respondents.

Case No. CV-N-99-137-ECR (PHA)

**REPLY TO RESPONSE (SIC) TO MOTION TO
 DISMISS PETITION FOR WRIT OF HABEAS
 CORPUS PURSUANT TO 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY**

MEMORANDUM OF POINTS AND AUTHORITIES**I.****LEGAL DISCUSSION**

**A. RESPONDENTS' MOTION TO DISMISS IS A PROPER RESPONSE IN FEDERAL
 HABEAS CORPUS LITIGATION AND IS PROPERLY BEFORE THIS COURT FOR
 CONSIDERATION.**

In his Response (sic) to Motion to Dismiss Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody ("Opposition"), DAVIS essentially claims that Respondents' Motion to Dismiss is an improper pleading that is not allowed by the courts. As this Court is well-aware, a motion to dismiss is an appropriate method for respondents to raise procedural defects in a petition. The Ninth Circuit has determined that Rule 4 of the Habeas Corpus rules does not expressly prohibit such motion practice. White v. Lewis, 874 F.2d 599, 602 (9th Cir. 1989). In fact, Rule 4 provides that after preliminary review by the judge, the court must order the respondent to file an

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1 answer "or to otherwise plead to the petition. . . ." Id. Quoting the Advisory Committee Note, the
 2 Ninth Circuit found that the rule clearly allows for a response other than a formal answer:

3 For example, the judge may want to authorize the respondent to make a
 4 motion to dismiss based upon information furnished by respondent,
 5 which may show that petitioner's claims have already been decided on the
 6 merits in a federal court; that petitioner has failed to exhaust state
 7 remedies; that the petitioner is not in custody within the meaning of 28
 U.S.C. §2254; or that a decision in the matter is pending in a state court.
 In these situations, a dismissal may be called for on procedural grounds,
 which may avoid the necessity of filing an answer on the substantive
 merits of the petition. . . .

8 Id., citing Habeas Corpus Rules, Rule 4, at Advisory Committee Notes.

9 DAVIS cites to Ukawabutu v. Morton, 997 F. Supp. 605 (D.N.J. 1998), for the proposition that
 10 a motion to dismiss is not a proper response to a federal habeas petition. The Ukawabutu court was of
 11 the view that judicial resources would be conserved by requiring consolidation of the procedural and
 12 substantive defenses in an answer. Beyond the fact that precedent from the district court of New Jersey
 13 cannot outweigh precedent of the Ninth Circuit, the reasoning of that court does not apply here. The
 14 New Jersey District Court stated its belief that consolidation would result in the court's being provided
 15 with relevant portions of transcripts of the proceedings and would eliminate unnecessary protraction of
 16 the proceedings. Ukawabutu, at 609-10. In this district, however, one party or the other have regularly
 17 filed the relevant portions of transcripts and records even when a motion to dismiss is based on
 18 procedural grounds. It is also more likely that the proceedings would be unnecessarily multiplied if the
 19 court were required in each instance to consider a separate request for leave to file a motion to dismiss,
 20 especially given the large number of petitioners untrained in the law.

21 It has been suggested that an answer should be required in every habeas
 22 proceeding, taking into account the usual petitioner's lack of legal
 23 expertise and the important functions served by the return. . . . However,
 24 under §2243 it is the duty of the court to screen out frivolous applications
 and eliminate the burden that would be placed on the respondent by
 ordering an unnecessary answer.

25 Habeas Corpus Rules, Rule 4, at Advisory Committee Notes.

26 The Ninth Circuit clearly recognizes the practice of filing motions to dismiss to raise procedural
 27 defects in a petition. Nothing in the Habeas Corpus Rules expressly prohibit the practice. Nor does this
 28

1 Court's Order entered on May 6, 1999, proscribe against filing a motion to dismiss to raise a procedural
2 defect as a defense. Accordingly, DAVIS' opposition on these grounds should be rejected.

3
4 **B. THIS COURT HAS COMPLETE DISCRETION TO ALLOW RESPONDENTS TO
FILE A LATE RESPONSIVE PLEADING.**

5 DAVIS also objects to Respondents' request to file their Motion to Dismiss after the stated
6 deadline, stating that the Motion is frivolous.

7 It is abundantly clear that this Court has complete discretion to grant such requests.
8 Rule 4 of the Rules Governing Section 2254 Cases (Habeas Corpus Rules) provides that the court "shall
9 order the respondent to file an answer or other pleading within the period of time fixed by the court or
10 to take such other action as the judge deems appropriate." The Advisory Committee Notes
11 following Rule 4 states as follows:

12 In the event an answer is ordered under rule 4, the court is accorded
13 greater flexibility than under §2243 in determining within what time
14 period an answer must be made. . . . In view of the widespread state of
15 work overload in prosecutors' offices . . . , additional time is granted in
16 some jurisdictions as a matter of course. Rule 4, which contains no fixed
time requirement, **gives the court the discretion to take into account
various factors such as the respondent's workload and the
availability of transcripts before determining a time within which an
answer must be made.**

17 Habeas Corpus Rules, Rule 4, at Advisory Committee Notes (citations omitted; emphasis added).

18 Respondents have made the proper showing for this Court to exercise its discretion to allow the
19 late filing of the Motion to Dismiss Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254
20 By a Person in State Custody. Alternatively, DAVIS has made no showing that he has suffered any
21 prejudice as a result of the late filing. DAVIS' objection on these grounds should be rejected.

22 **C. RESPONDENTS CONCEDE THAT GROUNDS 2(b) AND 2(c) WERE EXHAUSTED IN
DAVIS' SECOND STATE PETITION; HOWEVER, SUCH CLAIMS ARE ALSO
23 PROCEDURALLY BARRED.**

24 In the Motion to Dismiss, Respondents argued that Grounds 2(b) and 2(c) are unexhausted and
25 not properly before this Court. DAVIS has opposed that argument claiming that both of these grounds
26 have been properly presented to the state courts for consideration. As to Ground 2(b), DAVIS points to
27 his Second State Petition, to show that he did present this claim to the Nevada courts. See
28 Respondents' Motion to Dismiss, Exhibit J, at p. 16. Similarly, DAVIS points to his Affidavit in

Support of Motion for Writ of Habeas Corpus to show that he has presented Ground 2(b) to the state courts. See Respondents' Motion to Dismiss, at Exhibit K. Initially, Respondents noted that DAVIS' proper person petition was superseded by the filing of an Amended Petition after counsel was appointed. See Respondents' Motion to Dismiss, at Exhibit L. The superseding Amended Petition did not specifically allege the claims presented herein at Grounds 2(b) and 2(c), and Respondents argued that neither claim was properly presented to the state courts. Upon closer viewing, however, the Amended Petition purported to incorporate all the claims presented in the earlier proper person petition. See Respondents' Motion to Dismiss, Exhibit L, at p. 3. Accordingly, Respondents concede to **DAVIS' argument and admission** that Grounds 2(b) and 2(c) have been presented to the state courts for consideration and are therefore exhausted.

Although Grounds 2(b) and 2(c) are exhausted pursuant to their presentation to the state courts in DAVIS' Second State Petition, those claims are also procedurally barred from review in this Court on independent and adequate state law grounds. Coleman v. Thompson, 501 U.S. 722, 727, 731 (1991). In considering DAVIS' Second State Petition, the Nevada Supreme Court determined that the petition was successive and his claims were procedurally defaulted. See Respondents' Motion to Dismiss, at Exhibit Q.

In his habeas petition, appellant challenged the legality of his confession, charging that his Miranda rights has been violated; he claimed his counsel had been ineffective for failing to advise him regarding his right to appeal and for failing to move to dismiss a robbery charge; and he asserted that his plea was coerced and involuntary.

Our review of the records on appeal reveals that the district court did not err in denying the petition. Appellant's petition was successive, and he failed to demonstrate good cause for raising claims which he had previously raised or for raising claims which he could have raised in a direct appeal or in a prior petition. And appellant failed to demonstrate prejudice. See NRS 34.810(2)(b). (providing that the district court shall dismiss a petition if the claims could have been raised in prior proceedings or if the petitioner raises again claims which were adjudicated in a prior petition). Thus, appellant's petition was procedurally barred.

Respondents' Motion to Dismiss, Exhibit Q, at p.2. Under Nevada law, a successive or second petition can be dismissed. NRS §§34.745(3) and 34.810(2). As DAVIS admits, Grounds 2(b) and 2(c) were presented in his Second State Petition. The grounds presented in the Second State Petition were

1 dismissed on independent and adequate state law grounds. Accordingly, Grounds 2(b) and 2(c) are
 2 procedurally barred from review in this Court.¹ Accordingly, Grounds 1, and 2(d) should be dismissed.

3 II.

4 CONCLUSION

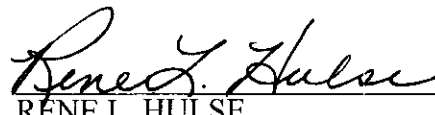
5 As DAVIS has correctly pointed out, Grounds 2(b) and 2(c) were presented to the Nevada courts
 6 in his Second State Petition. Respondents therefore concede that both claims have been exhausted.
 7 However, the Second State Petition was rejected by the state courts on independent and adequate state
 8 law grounds. Accordingly, Grounds 2(b) and 2(c) are procedurally barred from review in this Court. In
 9 the Motion to Dismiss, Respondents argued that Grounds 1 and 2(d) are also procedurally barred from
 10 review in this Court on independent and adequate state law grounds. Respondents therefore request that
 11 Grounds 1, 2(b), 2(c), and 2(d) be dismissed with prejudice.

12 DAVIS has now moved to dismiss Ground 1, and this Court has previously dismissed Ground 4,
 13 at DAVIS' request. Accordingly, only Grounds 2(a), and 3, remain before this Court for consideration.
 14 Respondents therefore withdraw their request to dismiss the instant Petition as a mixed petition, and
 15 request leave of this Court to respond to the two remaining grounds.

16 DATED this 28th day of June, 1999.

17
 18 FRANKIE SUE DEL PAPA
 19 Attorney General

20 By:



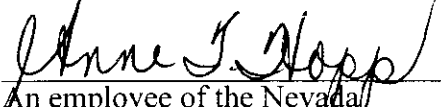
21 RENE L. HULSE
 22 Deputy Attorney General
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28 ¹ In their Motion to Dismiss, Respondents also argued that Grounds 1 and 2(d) are also barred from review in this Court on independent and adequate state law grounds.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on the 28th day of June, 1999, I served the foregoing REPLY TO RESPONSE (SIC) TO MOTION TO DISMISS PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY by mailing a copy thereof addressed to:

JIMMIE DAVIS, NDOP #27362
NEVADA STATE PRISON
P.O. BOX 607
CARSON CITY, NEVADA 89702


An employee of the Nevada
Attorney General's Office